Supreme Court, U.S.
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No. 97-1112

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

RICKY BELL, Warden,

Petitioner,

v.

RICHARD H. AUSTIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The opinion of the United States Court of Appeals for the Sixth Circuit in this case is published at 126 F.3d 843. The opinions of the United States District Court in this case are published at 927 F.Supp. 1058 and 938 F.Supp. 1308.

JURISDICTION

The judgment of the United States Court of Appeals was entered October 2, 1997. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l).

STATEMENT OF THE CASE

Defendant Richard Austin was convicted in October, 1977 under the second count of an indictment charging defendant in the first count with murder in the first degree and charging defendant in the second count with being an accessory before the fact to the offense of murder in the first degree. (State court trial transcript, Vol. IX, page 1016, hereinafter cited as "Tr. _____"). The prosecution's theory of the case at trial was that defendant Richard Austin, who owned a pool hall in Memphis, procured and paid to have Julian Watkins, an undercover special reserve agent, killed because Mr. Watkins led the undercover investigation that resulted in minor gambling charges having been brought against defendant Austin, his estranged wife, Joann Austin, and others. Defendant Austin was represented from arraignment through trial by Memphis attorney Robert Livingston.

No investigation of the case was conducted by attorney Livingston despite defendant Austin's consistent protestations of actual innocence except for a single interview of Jack Charles Blankenship, the hired killer who admitted that defendant Austin had nothing to do with the

crime. The case was tried before a jury and on October 22, 1977 the verdict of the jury was to find Mr. Austin "guilty of Accessory Before the Fact to Murder in the First Degree as charged in the second count." (Tr. 1048). The jury acquitted defendant Austin of the murder charge in count one of the indictment (Tr. 1048).

At the sentencing phase of this death penalty trial, defendant Austin's attorney presented no evidence whatsoever at the sentencing phase. The jury found that the punishment for defendant Austin should be death by finding only one of the four aggravating circumstances that the prosecution argued (Tr. 1139). The court imposed the sentence of death (Tr. 1140).

Defendant Austin's first post-conviction proceeding was heard in the Shelby County, Tennessee Criminal Court where two expert witnesses who were practicing attorneys in Shelby County testified in support of his post-conviction application on the issue of ineffective assistance of counsel. (Tr. 498-512).

Hearing was held in the United States District Court for the Middle District of Tennessee resulting in the grant of the writ of habeas corpus. References to the three volume transcript of the evidence in that proceeding will be cited as EH. Tr. _____.

The appeal to the United States Court of Appeals resulted in a judgment affirming the United States District Court on the finding of ineffective assistance of counsel at sentencing, but reversing the U.S. District Court on its finding of ineffective assistance of counsel at the guilt/innocence phase of the state court trial and reversing as to the "reasonable doubt" jury instruction.

There was no specific direct ruling by the United States Court of Appeals in this case as to

petitioner Bell's first alleged reason for granting the writ. No request for rehearing was made by petitioner Bell.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI: ARGUMENT

I. THE MERITS OF PETITIONER'S SECOND REASON FOR GRANTING THE WRIT DO NOT JUSTIFY GRANTING THE WRIT SINCE THE COURTS BELOW CORRECTLY APPLIED STRICKLAND v. WASHINGTON CONCERNING THE TRIAL ATTORNEY'S FAILURE TO PRESENT ANY EVIDENCE WHATSOEVER AT SENTENCING AND HIS FAILURE TO CALL CRITICALLY IMPORTANT WITNESSES.

Defendant Richard Austin was represented at his state court death penalty trial by attorney Robert Livingston.[1] Attorney Livingston presented absolutely no evidence at the sentencing phase of this death penalty trial despite the availability of numerous members of Richard Austin's family, his doctor and medical records, a minister, expert witnesses and others. Attorney Livingston failed to investigate and declined to interview any witnesses in preparation for the guilt phase of the trial. As a result, the United States District Court and the United States Court of Appeals ruled that attorney Livingston rendered constitutionally ineffective assistance of counsel.

Attorney Livingston demonstrated very little interest in the actual representation of defendant Austin in this death penalty trial. Attorney Livingston repeatedly demonstrated his lack of commitment and interest in the case right up through the federal court habeas proceeding when attorney Livingston failed to appear in response to a proper subpoena. Previously attorney Livingston had arbitrarily refused to answer questions at his deposition and defendant was required to obtain a federal court order mandating attorney Livingston to appear and answer questions about his role as the attorney in defendant's state court death penalty trial.

Attorney Livingston admits that he did not investigate and did not interview any witnesses

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[1] Defendant Richard Austin has previously filed a petition for a writ of certiorari (Richard H. Austin, Petitioner v. Ricky Bell, Warden, Respondent) in this case limited to issues concerning ineffective assistance of counsel at the guilt/innocence phase of his trial and limited to the jury instruction concerning "reasonable doubt."

in preparation for sentencing in this case except defendant Richard Austin himself. As to his interviews of defendant Austin, attorney Livingston admits that he made no memoranda or notes reflecting any client interviews prior to trial. (State Post-conviction Transcript, December, 1983, at 331; September, 1995 Livingston Deposition at 161-162).

Attorney Livingston presented no witnesses and no evidence at the sentencing phase of defendant Austin's death penalty trial. (September, 1995 Deposition of Livingston at 32) and he did no research as to what proof was admissible or available:

> Q. As Mr. Austin's attorney at the 1977 murder trial you did not call any witnesses during the mitigation or sentencing hearing; correct?
>
> A. Didn't have any to call, Mr. Woods.
>
> Q. Why not?
>
> A. There were none.
>
> Q. How about his doctor?
>
> A. His doctor?
>
> Q. Yes, sir.
>
> A. No, I didn't call his doctor...I don't know that that would have been a mitigating circumstance, that the man had a heart condition.
>
> Q. How about his family?...
>
> * * *
>
> A. ...I have found that family members are generally pretty much disregarded by a jury...
>
> * * *
>
> Q. So why did you not call any of the family members at the sentencing hearing? What was the downside to calling them?

A. I didn't see that they could contribute one iota to Richard Austin. Get up there and say that Richard Austin is a fine man when Richard Austin was not a fine man. Richard Austin was a savory (sic) character, of bad character, and I have never offered proof of good character for a defendant that I know was of bad character.

Q. So why did you have Mr. Austin testify then?

A. I expect Richard wanted to get up there and have his say....

* * *

Q. How about employees?

A. Employees? To testify as to Richard Austin's good character?

Q. ...how about employees testifying about how Mr. Austin treated them?

A. What would that have to do with a murder trial, how he treated them?

Q. Mr. Livingston, did you do any research before the Richard Austin murder case and sentencing hearing as to what's admissible at a mitigation hearing in a death penalty case?

A. Yes, sir, it was brand-new law.

Q. What did you conclude was admissible?

A. I concluded there were no mitigating circumstances.

* * *

Q. Did you read any of the reported case opinions in Federal Court on what's admissible at a mitigation hearing in a death penalty case?

A. I don't think at that time there were any reported cases pertaining to the 1977 death penalty law. There hadn't been time to write any.

Q. In other words, the U.S. Supreme Court cases on the Ohio or North Carolina or Georgia death penalty statute, you either didn't read them or you assumed they had no application.

A. No, I didn't read them. I didn't say they had no application; I say I didn't

read them.

Q. So the only research, legal research you did to prepare for the mitigation hearing was to look at the Tennessee Code Annotated.

MR. BAKER: Objection; leading.

THE WITNESS: That's exactly right.

(September, 1995 Livingston Deposition at 32 through 37). Attorney Livingston never had any intention of calling witnesses during the sentencing phase. (State Post-conviction Transcript, December, 1983, at 360 and 362). As to Richard Austin testifying, attorney Livingston simply recalls no conversations prior to trial with Mr. Austin about taking the witness stand and possibly talked to defendant Austin during a trial recess. (State Post-conviction Transcript, December, 1983, at 399).

Further, attorney Livingston states in his August 17, 1995 affidavit (part of Docket Entry 160) that he did not present any proof or witnesses at the mitigation hearing because it would have opened the door for rebuttal evidence. At his September, 1995 deposition attorney Livingston admits that the only possible negative character evidence in rebuttal would have been that Richard Austin was a pool shark (page 42), had two prior felony convictions (pages 42-43), and a previous gambling conviction where he paid a $29 fine (page 44), all of which had already been admitted into evidence previously by the prosecution. Thus, there could not have been any rebuttal on these issues.

Attorney Livingston also claims he failed to present mitigating evidence because it would have opened the door to rebuttal about "criminal associations" of Richard Austin and Livingston testified that the "criminal association" was Danny Owens who loaned Austin $1,000.

(September, 1995 Livingston Deposition at 46). Attorney Livingston then had to admit that all of this alleged rebuttal evidence (the felony convictions, pool shark, a gambler, a friend of Danny Owens, etc.) was "presented as proof at the 1977 murder trial by the prosecution, wasn't it?" The answer by Mr. Livingston was "it wasn't presented by me, though." The deposition continued. "Q. But it was presented by the prosecution?" "A. I think it was. I think it should have been. I think it was proper." (September, 1995 Livingston Deposition at 48). State court prosecutor McNeese confirmed this at the evidentiary hearing when he pointed out that the prosecution introduced evidence about Richard Austin's prior convictions during their case in chief at the sentencing phase of the bifurcated trial. (EH. Tr. 27).

The proof at the evidentiary hearing confirmed that attorney Livingston made no efforts to properly investigate and prepare. For example, Martha Purser, youngest sister of Richard Austin, testified at the evidentiary hearing that she was available in Memphis, Shelby County, Tennessee in October, 1977 when Richard Austin was tried for murder and was present at the trial every day. (EH. Tr. 42-43). Ms. Purser could have testified as to her life long knowledge of her brother at the mitigation/sentencing hearing. Instead, attorney Livingston never interviewed her (EH. Tr. 50); never asked what she knew about the murder of Julian Watkins (EH. Tr. 50); and attorney Livingston told her that "it wouldn't be good for a relative to testify" at the sentencing phase (EH. Tr. 50). A proper investigation and preparation would have demonstrated that Ms. Purser could have testified that Richard Austin was "well-mannered, generous;" that he was "good to people;" that he gave money and clothing to relatives and friends as well as to a neighbor lady and bought Christmas presents for children in the neighborhood who lacked money (EH. Tr. 50-51). Ms. Purser could also have testified as to Richard Austin's serious medical

problems including a heart attack and complications (EH. Tr. 51-52).

Even more important, Ms. Purser could have testified that Joann Austin, the defendant's estranged wife (who was also being represented by attorney Robert Livingston) and Terry Lee Casteel, the state's star witness had a romantic relationship behind defendant Austin's back. If interviewed and called to testify in 1977, she would have described the relationship between the state's star witness, Terry Lee Casteel, and defendant's wife, Joann Austin, as "spellbound" (EH. Tr. 53). She would have testified that when Terry Casteel's wife "kicked him out" that Joann Austin took Terry into her home, bought clothes for him, and Joann "was always talking about Terry...." (EH. Tr. 53-54). Ms. Purser would have testified in 1977 that Terry Casteel would have done anything for Joann Austin. (EH. Tr. 54).

Marsha Birdsong is defendant Richard Austin's stepdaughter. Her mother is Joann Austin, now known as Joann Skelton (EH. Tr. 65-66). Ms. Birdsong was residing in Memphis and was 18 years old at the time of trial. She was never interviewed by attorney Livingston. (EH. Tr. 65-66). If attorney Livingston had called her as a witness at sentencing, she could have testified "about the background and life history and lifestyle of Richard Austin" and would have testified that he was "...a good person...a good-hearted person...a caring person, a loving person...[who] would help anyone he could help" and that she had seen him do this "many times" (EH. Tr. 67). She also observed Richard Austin helping and attempting to help employees of the Golden Cue (EH. Tr. 68). She also could have testified that her mother, Joann Austin, had been hospitalized in 1977 (EH. Tr. 69) and knew that she had received psychiatric treatment in the 1970's (EH. Tr. 66). Ms. Birdsong attended the trial in October, 1977 (EH. Tr. 69). Attorney Livingston never introduced any of this evidence and never attempted to do so.

Another available but uncalled witness was Donald J. McClary who grew up with Richard Austin and knew him for 45 years (EH. Tr. 74-75). If Mr. McClary had been interviewed and if he had been asked to testify he would have made himself available and would have testified at the mitigation/sentencing hearing. Mr. McClary could have testified about how Richard Austin grew up, how he worked, and his helping other people such as Richard Austin giving Mr. McClary the money he needed to go to college. (EH. Tr. 76). Attorney Livingston never introduced any of this evidence and never attempted to do so.

Another available but uncalled witness was Midge Edwards who is the older sister of Richard Austin who grew up with him and has known him all his life (EH. Tr. 80-81). She was present at the Richard Austin trial in 1977 every day and talked to attorney Livingston several times before and during the trial. Each time attorney Livingston would say, "I don't have time for this" or "I don't need this" or "It is going to be year or two years before we need anything." (EH. Tr. 82). Ms. Edwards wanted to testify at the trial but did not because attorney Livingston said, "I'd let you sit in the courtroom; you can't testify...we don't need you anyway." (EH. Tr. 82-83). Ms. Edwards pointed out that most of Richard Austin's family was available and could have testified if interviewed and called. (EH. Tr. 84). Ms. Edwards made this known to attorney Livingston at the time of the trial. (EH. Tr. 84).

Ms. Edwards also could have testified about the relationship between Joann Austin and Terry Lee Casteel. She "saw them together. They were always talking real secret-like." (EH. Tr. 84). Midge Edwards also could have testified that when Joann Austin lived in her house in 1977, Ms. Edwards found in Joann's possession family photographs of Terry Casteel's children (EH. Tr. 100-101). Attorney Livingston never introduced any of this evidence and never attempted to do

so.

Sean Trimble testified that he is Richard Austin's son and would have been ten years old at the time of the October, 1977 trial. He was available to testify at the state court trial and would have testified about his great love for his father, but attorney Livingston never talked to him. (EH. Tr. 93-94).

Tammy Croft is Richard Austin's niece and would have been 13 at the time of the state court trial. She was never interviewed by attorney Livingston but was available to testify that Richard Austin was "a wonderful uncle, that he has always been there for me. All dance recitals, piano recitals, there to be the best uncle there is." (Eh. Tr. 95-96). Attorney Livingston never introduced any of this evidence and never attempted to do so. Ms. Croft was also one of the persons also who researched the Glankler law firm records in an unsuccessful attempt to find the tape recordings of Joann Austin that attorney Livingston failed to investigate or use. (EH. Tr. 97).

Billie Sue Edwards is Richard Austin's sister and was available to testify in Memphis in October, 1977. She was never interviewed by attorney Livingston and never talked to him. (EH. Tr. 106). She could have testified about Richard Austin's family life and his relationship to his parents as well as his having been hospitalized 21 days in intensive care. (EH. Tr. 107-108). Jimmy Edwards, Richard Austin's nephew, could have testified to similar issues (EH. Tr. 110) as could Jenny McDaniel (EH. Tr. 112-113). Attorney Livingston never introduced any of this evidence and never attempted to do so.

The Reverend Joseph B. Ingle also was available to testify in October, 1977 at the mitigation/sentencing hearing. Reverend Ingle holds a Master of Divinity degree from Union

Theological Seminary, was the recipient of a Merrill Fellowship to Harvard University, and has twice been nominated for the Nobel Peace Prize (EH. Tr. 119-120). Reverend Ingle was a co-founder of the Southern Coalition of Jails and Prisons in Tennessee which sponsored legal seminars for lawyers in connection with death penalty cases (EH. Tr. 120-212). Such a seminar was held in Tennessee in September, 1977 where attorneys from the Southern Poverty Law Center lectured about trial and appellate experience in death penalty cases. The seminar was presented for "lawyers in Tennessee" so they could learn expertise and knowledge "about how to interpret the new laws" on the death penalty (EH. Tr. 121). For this seminar lawyers were invited statewide using the Tennessee Association of Criminal Defense Lawyers mailing list (of which attorney Livingston was a member) (EH. Tr. 121-122).

Reverend Ingle has counseled numerous inmates on every death row in the south (except Arkansas) and has published numerous newspaper, magazine and book articles about the death penalty (EH. Tr. 122-123). He has testified in several death penalty cases about the Christian perspective concerning the death penalty which is "that we should be about forgiveness and redemption and reconciliation." (EH. Tr. 122-123).

Although Reverend Ingle had a very "high-profile involvement all across the state" in 1977 concerning the death penalty, neither he nor his organization was ever contacted by attorney Robert Livingston (EH. Tr. 124). His organization paid a great deal of attention to the Richard Austin case because it was the first case tried under the new Tennessee death penalty law (EH. Tr. 125) and it was his usual and customary practice to "routinely send a letter to the defense lawyer" in every Tennessee death penalty case to advise the defense lawyer that his organization had a brief bank, pleadings, research and other resources available to help the lawyer including the

names of local ministers in the county where the case was to be tried who were willing to testify. (EH. Tr. 125-127). In fact, attorneys Ed Lenow and Charles Wright who represented co-defendant Terry Castee! testified that their 1977 files contained a newsletter from Southern Prison Ministry about the Tennessee death penalty. (EH. Tr. 305, 343). Attorney Livingston never introduced any of this evidence and never attempted to do so.

Defendant Richard Austin asked attorney Livingston in 1977 to call witnesses on his behalf at trial (EH. Tr. 134). He specifically asked attorney Livingston to call Jack Charles Blankenship, Mary Scibilia, Mary Ward, Marilyn Lee, as well as family members (EH. Tr. 134-137, 139-140). Richard Austin asked attorney Livingston to go out and interview some of these witnesses and attorney Livingston said, "He didn't have the time or the manpower to be running all over the country running down witnesses." (EH. Tr. 135, 138). Richard Austin asked attorney Livingston to call his medical doctor to testify about his heart attack and pancreatitis but attorney Livingston did not (EH. Tr. 139).

In fact, attorney Livingston rarely met or talked with Richard Austin. The first conversation was in the presence of Joann Austin as described above. The other visits were to ask him to run down witnesses, which attorney Livingston declined to do and then Richard Austin "called him a couple of times about Casteel's statement" and that was the entire preparation before trial (EH. Tr. 155-156). Attorney Livingston's continuing theme was that this case will be put off and will not be tried (EH. Tr. 156).

Defendant Richard Austin testified during the guilt stage but before his testimony attorney Livingston did not go over his testimony with him (EH. Tr. 140) and before his testimony attorney Livingston did not prepare him for cross-examination (EH. Tr. 140--"We didn't talk

about it at all.").

This evidence is conclusive that attorney Livingston acted more as a prosecutor or at best as a neutral referee instead of being a zealous advocate for his client. Attorney Livingston's mistakes were so critical and serious that he simply did not function as constitutionally required "counsel" and as a result both the guilt phase and sentencing phase of defendant Richard Austin's state court murder trial were not reliable.

Attorney Charles R. Ray testified as an expert witness on this issue. Mr. Ray has practiced law since 1973 and is admitted to practice before the Supreme Court of the United States, the Sixth Circuit Court of Appeals, and the federal district courts in Tennessee and Kentucky. (EH. Tr. 208). Mr. Ray specializes in the practice of criminal defense law, is a member of the N.A.C.D.L., the T.A.C.D.L., and the Criminal Justice Section of the ABA, has been inducted into the publication "Best Lawyers of America" and has been certified by the National Board of Trial Advocacy as a criminal defense trial advocate. (EH. Tr. 208). Mr. Ray has litigated death penalty cases and based upon his review of the record, his expertise, and his experience, it is his opinion that attorney Robert Livingston rendered ineffective assistance of counsel in violation of Strickland v. Washington (EH. Tr. 209).

In addition, two Memphis attorneys testified at the first post-conviction hearing to the same effect. Attorney Russell X. Thompson who was qualified as an expert witness based upon his years of criminal defense practice in Memphis/Shelby County, Tennessee testified at the state post-conviction proceeding in December, 1983. Attorney Thompson was asked about attorney Livingston's failure to interview and call witnesses. (State Post-conviction Transcript at 499-500, 507). Attorney Thompson generally made the same criticisms and observations that attorney Ray

did concerning the failure to present any proof and the total abdication of any advocacy. Attorney Thompson specifically noted that attorney Livingston failed to investigate the case in a proper manner (State Post-conviction Transcript at 509-510); failed to adequately investigate substantial defenses (State Post-conviction Transcript at 511); and failed to have "any legitimate strategy in this case" (State Post-conviction Transcript at 511).

Attorney Livingston simply was not prepared. As trial judge Beasley testified, attorney Livingston "was notorious, so to speak, for announcing ready for trial." (EH. Tr. 362). This did not mean that attorney Livingston was in fact ready, it just meant he was commonly known to jump up and announce "ready" and not ask for continuances. (EH. Tr. 366-367).

Mr. Livingston refused to interview any of defendant Austin's family members and refused to call them as witnesses. Mr. Livingston never interviewed defendant Austin about the facts of the case right up to the point where he told defendant Austin he needed to take the witness stand. (Richard Austin affidavit and second affidavit, ¶ 14--part of Docket Entries 149 and 156).

Mr. Livingston did not present any evidence at the sentencing hearing. None. At the sentencing phase of a death penalty trial designed to allow the defendant great latitude in presenting mitigating evidence, attorney Livingston did not present a single iota of evidence as to defendant Austin's background, relationship to his employees, relationship with his family, how he had made his way in life or how he had been raised or his mental, emotional and physical status.

Attorney Livingston failed to object to the jury instructions with respect to their misleading requirement of unanimity concerning proof of mitigating circumstances.

The prejudice to defendant Austin is inescapable. This was a closely decided case where the jury acquitted Austin of first degree murder under count one and rejected three of the four

aggravating factors sought by the prosecutors. Attorney Livingston with proper investigation and preparation could have called as witnesses at the sentencing phase a number of people who were friends, family, employees and associates of defendant Austin (Richard Austin deposition, p. 23), such as Reed Buntyn (Austin deposition, p. 23), family members such as Midge Edwards (Austin deposition, p. 24), Billie Sue Edwards (Austin deposition, p. 24), Charles Edwards (Austin deposition, p. 25), James Edwards (Austin deposition, p. 25), Martha Purser (Austin deposition, p. 26), Jennie McDaniel (Austin deposition, p. 27), Joe McClary (Austin deposition, p. 28), Lester Leatherwood (Austin deposition, p. 28), employees Marie and Jack Hunter (Austin deposition, p. 25). Attorney Livingston consistently refused to talk to these witnesses and refused to consider using them (Austin deposition, pp. 27, 29). Attorney Livingston could have presented testimony from ministers (Austin deposition, p. 27) or even the Bishop of the Methodist Church (see Affidavit of Bishop Kenneth Carder--part of Docket Entry 149).

Attorney Livingston should have presented medical evidence about Richard Austin (Austin deposition, p. 30) and evidence concerning Austin's estranged wife, Joann Austin, who disappeared on the eve of trial. (Austin deposition, p. 55). Even Terry Casteel could have been called by attorney Livingston to testify as to mitigation for Austin and would have testified that "Richard never hurt anybody. He was kind to people. He would take people in.... He was always good to people, kind to people and would loan people money." (Casteel deposition, pp. 31-32). Finally, when attorney Livingston had Austin testify during the guilt phase, Livingston made no attempt to interview or prepare Austin for that testimony. (Austin deposition, p. 56). Even prosecutor McNeese testified that it is usual and customary in trial practice to interview witnesses before their testimony and to prepare them for that testimony. (McNeese deposition,

pp. 15-16).

Attorney Livingston has previously been judicially determined to have rendered ineffective assistance of counsel in the cases of United States v. Goodwin, 531 F.2d 347 (6th Cir. 1976); United States v. Stewart (No. 73-2125, U.S. Court of Appeals for the Sixth Circuit, Feb. 1, 1974); and Ronald E. Rickman v. Michael Dutton, (No. 3:85-0256, U.S. District Court, Middle District of Tennessee).

The benchmark for judging any claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984). A defendant must satisfy a two prong analysis. A defendant must show:

(1) that counsel's performance fell below an objective standard of reasonableness; Id. at 687, and

(2) that there is a reasonable probability that, but for the trial attorney's errors, the result of the proceeding would have been different. Id. at 692.

In judging the trial attorney's performance, a determination must be made as to whether the attorney's assistance was reasonable considering all the circumstances. Id. at 688. The court below correctly applied the Strickland test.

The same court recently ruled on the ineffective assistance of counsel issue in Glenn v. Tate, 1995 FED App. 0373P, No. 93-3568 (6th Cir. 12/21/95) where this Court denied a petition for the writ of certiorari. In Glenn v. Tate, the Sixth Circuit directed that the writ of habeas corpus should be granted in an Ohio death penalty case where the trial attorney rendered

ineffective assistance of counsel with respect to the mitigation/sentencing phase of the trial. In the Glenn case the court reviewed the ineffective assistance of counsel issue de novo and noted that "the jury was given virtually no information on [the defendant's] history, character, background, and organic brain damage--at least no information of a sort calculated to raise reasonable doubt as to whether this young man ought to be put to death. It was not that such information could not be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons. The information was not presented to the jury because counsel never took the time to develop it." Glenn at p. 5-6. The court also notes with approval in footnote 1 at page 6 the case of Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) cert. denied, 503 U.S. 592 (1992) where the court "reject[ed] the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."

In the Glenn case, the Sixth Circuit Court of Appeals specifically notes at page 8 that the problem was lack of preparation by the defense lawyers in that the "lawyers made no systematic effort to acquaint themselves with their client's social history. They never spoke to any of his numerous brothers and sisters. They never examined his school records. They never examined his medical records...."

The prejudice element discussed in Glenn v. Tate which is Strickland's second prong requires a defendant to show that the particular errors were unreasonable and had an adverse effect on the defense. Id. at 693. The test for finding prejudice requires a showing "...that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is "a probability sufficient to undermine confidence in the outcome...." Id. at 694. See also, Glenn v. Tate at 13. See also, O'Neal v.

McAninch, 115 S.Ct. 992 (1995). The guiding principle of the courts in considering ineffectiveness of counsel claims is whether, despite a presumption of reliability, the result of a particular proceeding is probably unreliable due to a deficiency in the adversarial process. Strickland. at 696.

Strickland's prejudice element may sometimes be presumed especially where attorney Livingston had a conflict of interest in representing both Richard Austin and Joann Austin. Prejudice is legally presumed when the assistance of counsel altogether has been actually or constructively denied. Id. at 692; Powell v. Alabama, 287 U.S. 45, 56 (1932). The presumption of prejudice is justified where there have been various kinds of state interference with counsel's assistance. Id. The failure to subject the prosecution's case to meaningful adversarial testing raises a presumption of prejudice. United States v. Cronic, 466 U.S. 648, 659 (1984). The presumption is justified in circumstances where the prejudice is so likely that a case by case inquiry into the alleged prejudice is not feasible. Strickland, 466 U.S. at 692.

In this case there is no necessity to presume prejudice because defendant has demonstrated clear areas of prejudice. First, attorney Livingston failed to put on any proof at the mitigation/sentencing hearing when ample proof about Richard Austin's life history, medical history, and his care and consideration for others was available. Second, attorney Livingston failed to prepare Richard Austin for his testimony and failed to prepare him for cross-examination, leading to a confused and confusing presentation to the jury. Third, attorney Livingston had no theory of the case to present to the jury.

The sixth amendment and fourteenth amendment requirements of effective assistance of counsel also apply to the penalty phase. Strickland, 466 U.S. at 687. Courts are particularly

cautious in preserving a defendant's right to effective assistance of counsel at a capital sentencing hearing. See, e.g., Kubat v. Thieret, 867 F.2d 351, 367 (7th Cir.) cert. denied 110 S.Ct. 206 (1989); Deutscher v. Whitley, 884 F.2d 1152, 1160-61 (9th Cir. 1989); and Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.) cert. denied 110 S.Ct. 573 (1989).

The quality of the representation afforded during the penalty stage of defendant's trial must be considered in light of the Supreme Court holding that "in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of the defendant prior to the imposition of the death sentence." Gregg v. Georgia, 428 U.S. 353, 189 n.38 (1976).

The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel. A substantial failure to offer such information plainly constitutes ineffective assistance of counsel. See Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976).

Even in non-capital cases, counsel has a constitutional obligation to present evidence to the sentencing authority of all relevant mitigating circumstances such as the background and character of the defendant. Counsel is ineffective "if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1977). It is the duty of counsel to interview potential witnesses and to make an independent examination of the factual circumstances in law involved.

During the sentencing phase of defendant's trial, defense counsel proved his lack of investigation by submitting no evidence. Trial counsel Livingston failed to call members of defendant's family or his friends or his employees or his doctor or any minister or expert--all of

whom were available to testify at the sentencing phase.

On this issue of ineffective assistance of counsel, the district court below stated in its Memorandum Opinion dated January 26, 1996 in the case of Richard H. Austin v. Ricky Bell, Warden, No. 3:86-0293 (United States District Court for the Middle District of Tennessee):

> The Court concludes that Petitioner received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. The Court finds that attorney Robert Livingston failed to conduct sufficient investigation, failed to file sufficient pretrial motions, failed to present evidence at sentencing, and failed to call critically important witnesses during the guilt phase of trial.
>
> * * *
>
> Mr. Livingston did not present any evidence at the sentencing hearing. This is shocking because the sentencing phase of a death penalty trial is designed to allow the defendant an opportunity to present mitigating and humanizing evidence. However at Petitioner's sentencing hearing, Mr. Livingston did not present any evidence regarding Petitioner's personal background, relationships to friends and family, or mental or physical health. Mr. Livingston made this decision despite the existence of numerous witnesses who indicated at the evidentiary hearing that they had wished to testify.
>
> Mr. Livingston's actions undoubtedly caused prejudice to Petitioner. This was a closely decided case where the jury acquitted Petitioner of first degree murder under count one and rejected three out of the four aggravating factors sought by the prosecutors. If Mr. Livingston had properly investigated and prepared the case, he would have called multiple witnesses who were friends, employees, or associates of Petitioner, or who were religious leaders. Deposition of Richard Austin ('Austin Depo.') at 23-31. Mr. Livingston's failure to call witnesses was particularly problematic at the sentencing phase of the trial.
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> Finally, Mr. Livingston should have interviewed Mr. Austin and prepared him to testify before Mr. Livingston called him to the stand during the guilt phase of the trial. Austin Depo. p. 56.

II. AT THE TIME OF DEFENDANT AUSTIN'S DIRECT APPEAL TENNESSEE HAD NO INDEPENDENT AND ADEQUATE PROCEDURAL DEFAULT RULE IN EXISTENCE AND THE TENNESSEE COURT DID NOT CLEARLY AND EXPRESSLY RELY UPON A PROCEDURAL DEFAULT RULE. ALTERNATIVELY, CAUSE AND PREJUDICE EXISTED SO AS TO EXCUSE ANY PROCEDURAL DEFAULT, ESPECIALLY WHERE, AS HERE, CLAIMS OF ACTUAL INNOCENCE AND INEFFECTIVENESS OF COUNSEL ARE AT ISSUE.

The factual basis for defendant Austin's ineffective assistance of counsel claim was specifically raised at the first post-conviction case in state court. Two different attorneys testified as expert witnesses in the Shelby County Criminal Court during defendant Austin's first post-conviction proceeding. Among the other issues that were raised in timely fashion at this first post-conviction proceeding was that attorney Robert Livingston who represented Austin at his death penalty trial failed to present any evidence whatsoever at the sentencing phase. Accordingly, the Keeney v. Tamayo-Reyes doctrine has no application.

In the alternative, the comity and procedural default aspects of cases such as Keeney v. Tamayo-Reyes do not apply considering the state of Tennessee law as it existed from 1976 through 1981 when defendant Austin was tried and when his first post-conviction proceeding was heard and appealed. There was no independent and adequate state procedural rule in effect in Tennessee at that time.

The procedural default rule is that if a federal habeas corpus litigant fails to follow an independent and adequate state procedural rule and the last state court rendering judgment in the case "clearly and expressly" based its opinion on such a state procedural rule, then the habeas corpus petition is subject to dismissal unless there is a claim of actual innocence or unless defendant shows cause to excuse his failure to bring such claims to the state courts and shows

actual prejudice to his defense. Coleman v. Thompson, 50 U.S. 722, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991); Harris v. Reed, 489 U.S. 225, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). If the state of Tennessee has no such rule and if the state court did not "clearly and expressly" base its ruling on such a rule, there is no default. Harris v. Reed, 489 U.S. 225, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989).

T.C.A. §40-3812 at the time of defendant Austin's state court appeal provided that an issue or assignment was "waived" if it was not presented by defendant in each court proceeding where it could have been presented. At the time of defendant's appeal, this statute did not create an independent and adequate state rule because T.C.A. §40-3409 (which was repealed in 1981) provided that in a case such as defendant Austin's the state court appellant was not required to set forth issues or statements of error since the Supreme Court of Tennessee was "bound...to consider any errors in the record, whether there has been an assignment or not." James v. State, 385 S.W.2d 86, 90 (Tenn. 1964), cert. denied 381 U.S. 941, 85 S.Ct. 1777, 14 L.Ed.2d 705 (1965).

The holding of James v. State, supra, that the Tennessee Supreme Court must review the entire record and proceedings on direct appeal has been confirmed numerous times. Adams v. State, 547 S.W.2d 553 (Tenn. 1977); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985), cert. denied 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986); and State v. Martin, 702 S.W.2d 560 (Tenn. 1985).

Alternatively, in this case there was no clear and express statement by the Tennessee court that its opinion was based upon an independent and adequate state procedural rule. Accordingly, there is no procedural default bar in this case. As stated in Kenneth Wayne O'Guinn v. Michael

Dutton, 1996 FED App. 0194P (6th Cir.) No. 93-5578/5620 (U.S. Court of Appeals for the Sixth Circuit 7/3/96) (Merritt, J. concurring):

> In Harris v. Reed, 489 U.S. 225 (1989), the Supreme Court made it clear that procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar. In that case, Harris filed a petition in Illinois state court for post conviction relief based on ineffective assistance of counsel. The state trial court dismissed the petition and the Illinois appeals court affirmed. The appeals court, while concluding that Harris could have raised his ineffective assistance claim on direct review, and stating that those issues that could have been presented on direct review are considered waived, went on to consider Harris' claims on the merits. On federal habeas review of Harris' claim, the Supreme Court concluded that the state court decision rested primarily on federal law because the Illinois appeals court did not 'clearly and expressly' rely on waiver as a ground for rejecting Harris' federal claim. Harris, 489 U.S. at 263 ('[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.'). Similarly, in Coleman v. Thompson, 501 U.S. 722, 735 (1991), the Supreme Court held that
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> > if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those [federal] claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the opinion.
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> Id.; see also Caldwell v. Mississippi, 472 U.S. 320, 327-28 (1985) (presumption of federal jurisdiction on habeas review where state court's decision appears to rest primarily on federal law, absent a clear and express statement that the decision is based on independent state grounds); Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (same).

Accordingly, since the original decision of the Tennessee courts was based upon a federal claim concerning the sixth and fourteenth amendments, the procedural default doctrine does not apply.

The Tennessee Supreme Court originally affirmed the judgment in this case in State v.

Austin, 618 S.W.2d 738 (Tenn. 1981) and the Supreme Court denied the petition for a writ of certiorari in Austin v. Tennessee, 454 U.S. 1128 (1981). Thereafter, defendant Austin filed four additional state court post-conviction proceedings but relief was routinely denied. As the United States Court of Appeals for the Sixth Circuit stated in Kenneth Wayne O'Guinn v. Michael Dutton, No. 93-5578/5620 (U.S. Court of Appeals for the Sixth Circuit 7/3/96) at 29 (Merritt, J. concurring):

> ...this statement [routine denials] by the Tennessee appeals court does not 'clearly and expressly rely on an independent and adequate state ground; to decide the claim, as required by Harris and reaffirmed in Coleman. This blanket statement declining to review a number of claims, in fact, provides ample reason to question whether the denial of the ineffective assistance claim was based on waiver, a state ground, or a previous determination that counsel's conduct did not violate O'Guinn's constitutional rights, which a federal court must review on habeas.
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> The conclusion that the claim has not been waived is also supported by the Supreme Court's decision in Ylst v. Nunnemaker, 501 U.S. 797 (1991). In Ylst, decided on the same day as Coleman, the Supreme Court stated that
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> > where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion 'fairly appear[s] to rest primarily on federal law,...we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place.
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> 501 U.S. at 803.

To apply the cause and prejudice standard, there must first be a firmly established state procedural rule which applies to the claim and the defendant must not have followed such firmly established state procedural rule. Warner v. United States, 975 F.2d 1207, 1213-13 (6th Cir. 1992), cert. denied, _____ U.S. _____, 113 S.Ct. 1314, 122 L.Ed.2d 702 (1993). In this case there was no such firmly established rule which was applied by the Tennessee court.

In the event, however, that this court should find that there was a Tennessee procedural default rule that applied to defendant Austin's direct appeal, then this court should consider whether there was cause and prejudice to excuse defendant's claims. The Supreme Court has not defined the word 'cause' and the Supreme Court has not set forth a list of factors that justify a finding of cause. Smith v. Murray, 477 U.S. 527, 534, 106 S.Ct. 2661, 2666, 91 L.Ed.2d 434 (1986). However, the Supreme Court has ruled that cause exists where the state inmate provides an explanation to excuse his attorney's failure to follow the state procedural rule and shows an objective factor external to the defense which prevented the attorney's effort to follow the rule or demonstrates ineffective assistance of counsel. See Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984); Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2646-2650, 91 L.Ed.2d 397 (1986). Actual prejudice is shown when such errors work to the 'actual and substantial disadvantage' of the defendant. United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982). Defendant Austin satisfies this burden by his successful showing of incompetence of counsel.

The United States District Court below found the following with respect to procedural default concerning ineffective assistance of trial counsel (Austin v. Dutton, No. 3:86-0293, M.D. Tenn., slip opinion at 8-9):

> Upon reviewing the matter, the Court finds that in his first post-conviction proceeding the Petitioner raised the issue of ineffective assistance of trial counsel. The trial court found that Petitioner was not deprived of effective assistance of counsel in violation of his constitutional rights. On April 17, 1985, the Tennessee Court of Criminal Appeals affirmed that decision. Thereafter, the Tennessee Supreme Court denied Petitioner's application for permission to appeal.
>
> The State argues, however, that while petitioner timely raised some issues surrounding the ineffectiveness of his trial counsel, he did not specifically raise the

three claims stated above and therefore, Petitioner has procedurally defaulted on them. The Court does not find the State's argument persuasive. The Tennessee courts have had the chance to review Petitioner's record and to determine whether or not Petitioner had effective assistance of trial counsel. In that Petitioner has presented the overall claim of ineffective assistance of counsel to the Tennessee courts, the Court does not find that Petitioner should be penalized for his failure to present three sub-issues concerning his ineffective assistance of counsel claim. In fact, the Tennessee Supreme Court has stated that it "is not willing to penalize a criminal defendant for an incomplete and/or inaccurate assignment [of errors]. See Adams v. State, 547 S.W.2d 553, 557 (Tenn. 1977).

As noted above, the factual basis of this claim was presented to the state court at the first post-conviction through the testimony of two attorneys.

Further, in the alternative the procedural defaults claimed by appellant were the direct "result of ineffective assistance of counsel" rendered by attorney Livingston. Murray v. Carrier, 477 U.S. 478, 488 (1986). The errors of attorney Livingston were so serious as to "deprive the defendant of a fair trial...." Strickland v. Washington, 466 U.S. 668, 687 (1984), and this rendered the trial result unreliable.

Further, the exceptions to 28 U.S.C. §2254 apply as follows. The factual determination by the Tennessee court was erroneous as argued above in the ineffective assistance of counsel issue. No deference was due to the state courts on this issue because several of the exceptions to 28 U.S.C. §2254(d) apply, to-wit:

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;

* * *

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:....

Good cause existed with respect to these claims because defendant Austin was held incommunicado under solitary confinement type conditions in prison for almost eleven years commencing in 1977. These concerns were specifically raised in paragraphs 66 through 165 of defendant's petition for habeas corpus relief. Because of the intolerable and outrageous physical and mental problems created for death row inmates by the state of Tennessee, those inmates including defendant Richard Austin were unable to receive full, fair and adequate hearings in order to adequately develop the material facts of his case and were substantially impaired from consulting with attorneys. As a result, from and after the day of his trial conviction, defendant Austin was denied effective communication with the outside world including his counsel and was held under such depressing conditions that he could not function at the time when the state post-conviction proceeding was first filed. See the Stipulation of Facts and testimony in William Groseclose v. Cletus McWilliams.

Finally, there is an issue of actual innocence. This was a very closely decided trial as the state court jury "acquitted Petitioner of first degree murder under count one and rejected three out of the four aggravating factors sought by the prosecutors." Richard H. Austin v. Ricky Bell, No. 3:86-0293 (U.S. District Court for the Middle District of Tennessee, Memorandum Opinion 1/26/96 at 23).

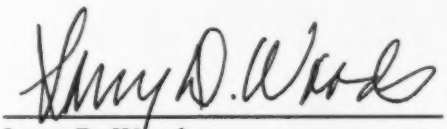
In Keeney v. Tamayo-Reyes, 504 U.S. 1, 12 (1992), this Court held: "We also adopt the narrow exception to the cause-and-prejudice requirement: A habeas defendant's failure to develop a claim in state court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Cf. McCleskey v. Zant, 499 U.S., at 494; Murray v. Carrier, 477 U.S., at 496.

Defendant Austin's innocence was raised and presented to the Tennessee Supreme Court on direct appeal in the "statement of issues presented" as No. VIII in Assignment of Errors and Brief and Arguments in the Supreme Court of Tennessee in Austin v. State on September 15, 1978. This assignment specifically cited the "...insufficiency of proof and potential miscarriage of justice." (Appellant's Brief at p. 28).

CONCLUSION

Because the issues presented by petitioner Ricky Bell, Warden are so broadly stated, because the first issue concerning Keeney v. Tamayo-Reyes was not ruled upon directly by the United States Court of Appeals for the Sixth Circuit, because the issues concerning ineffective assistance of counsel were directly raised at the first post-conviction proceeding in the state courts, and in the alternative because Tennessee had no procedural rule effective to invoke the Keeney v. Tamayo-Reyes doctrine, defendant Austin respectfully urges that the petition for writ of certiorari as to these issues should not be granted.

Respectfully submitted,



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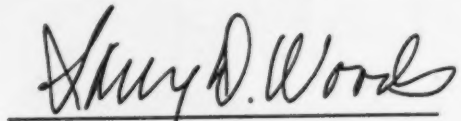
PROOF OF SERVICE

I hereby certify that two copies of the foregoing Respondent's Brief in Opposition have been delivered by the United States Mail, first class postage prepaid, to all parties required to be served including John Knox Walkup and Michael E. Moore, Office of the Attorney General, 425 5th Avenue North, Nashville, TN 37243-0497, on or before this 2nd day of February, 1998.



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